IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.86 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

PEASS INDUSTRIAL ENGG. PVT. LTD.

Appearance:

MRS M.M. BHATT for Petitioner No. 1

SERVED BY RPAD - (N) for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 29/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench 'B' has referred the following two questions of law under Section 256(2) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax, Central, Ahmedabad.

"Whether, on the facts and in the circumstances of the case, the appellate Tribunal has been

right in law in deleting the penalty imposed by the Income-tax Officer under section 271(1)(c) read with explanation thereto and sustained by Commissioner of Income-tax (Appeal) ?"

Whether, the finding of the Appellate Tribunal in deleting the penalty imposed under section 271(1)(c) read with explanation thereto is not unreasonable and or perverse ?"

2. The Assessment Year is 1975-76 and the relevant accounting period is the Financial year ended on 31-03-1975. The respondent - assessee filed return of income on 18-07-1975 declaring total income at Rs.1,25,210/-. The assessment came to be finalized on 18-09-1978 under Section 143(3) read with Section 144B of the Act computing total income at Rs.5,49,170/-. The Assessing Officer initiated proceedings under Section 274 read with Section 271(1)(c) of the Act for concealment penalty since the difference between the income returned and the assessed income was more than 80%.

3. Against the order of assessment the assessee preferred appeal before CIT (Appeals) Baroda and vide order dated 31-03-1981 the assessee was granted partial relief and the revised total income was computed at Rs.3,15,080/-. Both the assessee as well as Department went in appeal before the Tribunal. An order giving effect to the order of the Tribunal was passed on 26-04-1982 and the revised total income was computed at Rs.2,32,100/-. The said figure was subsequently revised at Rs.2,04,104/- vide order dated 16-05-1982 passed under Section 154 of the Act.

4. In the penalty proceedings the Assessing Officer, after considering the explanation tendered by the assessee, levied penalty at Rs.1 lac under Section 271(1)(c) of the Act by holding that the Explanation to Section 271(1)(c) of the Act was clearly applicable and the assessee had failed to discharge the onus under the Explanation, and this was a case of deemed concealment.

5. The assessee carried the matter in appeal but failed to convince the CIT (Appeals) who confirmed the penalty levied by the Assessing Authority. The assessee went in Second Appeal before the Tribunal and the Tribunal, for the reasons stated in its order of 28-03-1984, accepted the explanation tendered by the assessee and cancelled the penalty allowing the appeal filed by the assessee.

6. Mrs.M.M.Bhatt, learned Standing Counsel for the

applicant - Revenue, has submitted that the Tribunal erred in holding that the assessee had discharged the onus. She submitted that the Assessing Officer had pointed out four specific instances on the basis of which a lump-sum addition of Rs.2 lacs was made in the Assessment Order. That in these circumstances, the assessee was required to explain each and every discrepancy to the satisfaction of the authority and on failure to do so was liable to be visited with penalty under Section 271(1)(c) of the Act. Though served, there is no appearance on behalf of the respondent - assessee.

7. The four points, on which the Assessing Officer summarized the basis for levying penalty, have been reproduced by the Tribunal and read as under :

"(i) The sales price has been shown at a large higher rate to the assessee than the sale price shown and charged in respect of sales made of similar commodities to other well reputed concerns.

(ii) M/s. Akbarali Nazarali could not show purchases of alluminium alleged to have been sold to Peass Indl. Engineering Pvt. Ltd.

(iii) M/s. Akbarali Nazarali has shown sales of Rs.51,752/- to Peass Industrial Engineers Pvt. Ltd. but such purchases have not been shown by the assessee-company.

(iv) A cheque of Rs.30,000/- is not entered in the books of accounts of M/s.Akbarali Nazarali though debited by Peass Industrial Engg. Pvt. Ltd."

8. The Tribunal has found that during the course of assessment proceedings the gross profit shown by the assessee was found by the Assessing Officer to have fallen by 2% as compared with the gross profit for the immediately preceding Assessment Year despite the fact that the turn over had increased from about Rs.47 lacs to Rs.77 lacs. The Assessing Officer, therefore, while framing the assessment made a lump-sum addition of Rs.2 lacs with the approval of the Inspecting Assistant Commissioner under Section 144B of the Act. The said lump-sum addition came to be reduced by Rs.1 lac by CIT (Appeals). The Tribunal ultimately confirmed the addition of Rs.1 lac. The reason for making the lump-sum

addition was, as stated, the fall in gross profit and the various defects found in the books of accounts resulting in rejection of the books of accounts by invoking provisions of Section 145(1) of the Act.

In the case of Commissioner of Income-Tax, Gujarat I Vs. S.P.Bhatt, [1974] 97 ITR 440, the facts were that the Income Tax Officer did not accept the figures of profit appearing from the books maintained by the assessee because no quantitative stock account was maintained, a majority of sales were not supported by vouchers and the gross profit disclosed in the books of account appeared to be low. However, it was not the case of the Income-Tax Officer that any particular entries in the books of account were false or any particular items of purchase or sale were omitted to be entered in the books of account. In this factual backdrop, this Court, after enunciating the law as regards burden of proof, held that it was open to the Income-Tax Officer in absence of proper verificatory records not to accept the figures of profit shown by the assessee and make best judgment assessment but "from that it does not follow that the accounts maintained by the assessee were false or incorrect or that the income returned by the assessee was not the correct income. It must follow by necessary implication that the failure to return the total assessed income was not on account of any fraud or gross or wilful neglect on the part of the assessee."

9. In relation to the Explanation to Section 271(1) of the Act, the Court held as under :-

> "..... The Explanation creates a legal fiction if the condition of its applicability is satisfied. The condition is an objective condition, namely, that the total income returned by the assessee should be less than eighty per cent of the total income assessed, and the assessee is straightway brought within the penal provision in section 271(1)(c). But this legal fiction can be displaced if the assessee proves--and this burden is upon him--that the failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part. This burden is not of the same nature which rests on the prosecution in a criminal case where the prosecution has to establish the guilt of the accused beyond reasonable doubt nor is it of the same nature as the burden which lies upon the revenue in establishing that the assessee has concealed the

particulars of his income or furnished inaccurate particulars of such income. It is a burden akin to that in a civil case where the determination is made upon preponderance of probabilities. It is also not necessary that any positive material should be produced by the assessee in order to discharge this burden which rests upon him. The assessee may claim to have discharged the burden by relying on the material which is on record in the penalty proceedings, irrespective of whether it is produced by him or by the revenue. If it can be said on a preponderance of probabilities that the failure to return the total assessed income has not arisen on account of any fraud or any gross or wilful neglect on the part of the assessee, the legal fiction enacted in the Explanation cannot arise and the revenue must fail in its attempt to impose penalty upon the assessee."

10. In the present case the Tribunal has found in relation to the first point that M/s.Akbarali Nazarali has explained that the goods sold to the assessee were obtained by the said firm on approval basis and hence, were not recorded in its books on the date of sale to the assessee; in relation to the higher price charged by M/s. Akbarali Nazarali to the assessee the explanation that this was because of insistence about the quality of goods and the option to reject the goods if the quality was found unsatisfactory was also accepted; in relation to third point regarding bearer cheque of Rs.30,000/-. The explanation tendered by the assessee that a partner of M/s.Akbarali Nazarali had encashed the cheque and temporarily utilized the funds before bringing into books of the firm in subsequent years has also been found to be a probable explanation by the Tribunal. After recording the aforesaid findings the Tribunal has held that the explanation given by the assessee in respect of the above points raised by the Assessing Authorities are such that the balance of probabilities is in favour of the assessee and in so far as the discrepancies in the books of the seller are concerned, that was a matter for the said firm to explain and for that the assessee could not be said to have committed any default so as to be visited with penalty.

11. In light of these findings, the Tribunal has cancelled the penalty. In case of Commissioner of Income-Tax Vs. Mussadilal Ram Bharose, [1987] 165 ITR 14 the Supreme Court has laid down that the Explanation to Section 271(1)(c) of the Act raises a rebuttable

presumption and the initial burden of discharging the onus of rebuttal is on the assessee. Once that initial burden is discharged, the assessee would be out of mischief unless further evidence was adduced. That the rebuttal must be on materials relevant and cogent. It is for the fact-finding body to judge the relevancy and sufficiency of the materials. If such a fact-finding body, comes to the conclusion that the assessee has discharged the onus, it becomes a conclusion of fact.

12. Applying the aforesaid principle it is apparent that the Tribunal has found that the assessee has discharged the onus and there is no further material adduced by the Revenue to shift burden once again so as to sustain penalty.

13. In the result, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the penalty imposed by invoking provision of Section 271(1)(c) read with Explanation thereto and it cannot be stated to be a finding which was either unreasonable or perverse.

14. Both the questions referred for the opinion of this Court are, therefore, answered in the affirmative i.e. in favour of the assessee and against the Revenue.

15. The Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-

[D.A.MEHTA,J] [H.N.DEVANI,J]

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